

APPEAL NO. 080023
FILED MARCH 13, 2008

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 11, 2007. The issues before the hearing officer were:

- (1) Did the respondent/cross-appellant (claimant) sustain a compensable injury on (10 days after date of injury)?
- (2) Did the claimant have disability resulting from an injury sustained on (10 days after date of injury), and if so, for what period?
- (3) Is the appellant/cross-respondent (carrier) relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001?
- (4) What is the date of injury?
- (5) Did the Texas Department of Insurance, Division of Workers' Compensation (Division) abuse its discretion in instructing the designated doctor to determine whether an injury resulted from the claimed accident?

The hearing officer determined that: (1) the date of injury could not be determined; (2) the claimant did not sustain a compensable injury on _____, (7 days after date of injury), or (10 days after date of injury); (3) because the claimant did not have a compensable injury, the claimant did not have disability; (4) the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and (5) the Division did not abuse its discretion in instructing the designated doctor to determine whether an injury resulted from the claimed accident.

The carrier appealed the hearing officer's determination that the Division did not abuse its discretion in instructing the designated doctor to determine whether an injury resulted from the claimed accident. The claimant appealed the hearing officer's date of injury, compensability, disability, and timely notice determinations. The carrier responded to the claimant's appeal. There is no response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

BACKGROUND INFORMATION

The claimant testified that she sustained a work-related injury to her right ankle on Monday, _____, and when she jumped off a platform at work and that she was confused regarding the previous claimed dates of injury of (7 days after date of injury) and (10 days after date of injury). In evidence are the employer's "Employee Timecard Report(s)" that show that the claimant did not work on (7 days after date of injury) or (10 days after date of injury). The claimant filed an amended Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease (DWC-41) with the Division on November 8, 2007, that shows that the claimant's date of injury is _____.

The claimant sought medical treatment with Dr. S, a podiatrist. A medical report dated May 1, 2007, from Dr. S shows that he diagnosed the claimant with "Gouty Arthropathy Right Ankle." An MRI of the right ankle dated June 5, 2007, shows an impression of a "[s]ubacute fractures involving the distal tibia, distal shaft of the fibula, and medial malleolus with an intact ankle [illegible word]" and "[t]orn anterior talofibular ligament." In an undated letter, Dr. S stated that the claimant's condition had not improved and that the advanced imaging tests showed a "non displaced fracture of the fibula and tibia which could not be seen on plain radiographs." Dr. S commented that the claimant's ankle injury occurred at work but that it took time to gather information to determine that the claimant had an ankle fracture.

The claimant testified that she reported the injury to the "cashier" on the date of injury, and then reported her injury to Ms. C, the "office manager", after she sought medical treatment for her right ankle in May and June 2007. The claimant testified that she trivialized her right ankle injury because she thought she only had an ankle sprain and that she was misdiagnosed with gouty arthropathy when in fact she had an ankle fracture.

ABUSE OF DISCRETION

The hearing officer's determination that the Division did not abuse its discretion in instructing the designated doctor to determine whether an injury resulted from the claimed accident is supported by sufficient evidence and is affirmed.

DATE OF INJURY, COMPENSABLE INJURY, DISABILITY, AND TIMELY NOTICE

The hearing officer erred in determining that the date of injury could not be determined. When the date of injury is an issue, the hearing officer has wide latitude in deciding a date of injury, however the hearing officer may not refuse to resolve the issue before him by saying the claimant had not proven a date of injury. See Appeals Panel Decision (APD) 021632, decided July 25, 2002. Because the date of injury is significant in determining when benefits are due, the hearing officer was required to find a specific date of injury. See APD 012988, decided January 10, 2002. If the hearing officer believed the evidence before her was insufficient for her to make a determination on the

date of injury the hearing officer has a duty to fully develop the facts required for the determination to be made. See APD 021632, *supra*, and Section 410.163(b). The Appeals Panel has not required the date of injury found by a hearing officer to be the same as the date alleged by the claimant when the evidence indicates otherwise. See APD 941029, decided September 16, 1994. In the instant case, the hearing officer could have decided a date of injury based on the claimant's testimony and the medical evidence. It was legal error for the hearing officer to not determine a specific date of injury. Accordingly, we reverse the hearing officer's determination that the date of injury could not be determined and we remand the date of injury issue back to the hearing officer to make a determination consistent with the evidence in this case.¹

The hearing officer erred in determining that the claimant did not sustain a compensable injury and that the claimant did not have disability. In unappealed findings of fact regarding the claimed injury and disability, the hearing officer determined that: the "[c]laimant sustained damage or harm to the physical structure of her body in the course and scope of employment" and that "[t]he claimed injury was a cause of the [c]laimant's inability to obtain and retain employment at wages equivalent to her pre-injury wage beginning on May 25, 2007 and continuing through the date of this hearing, but at no other times." The hearing officer concluded that because the date of injury could not be determined, that the claimant did not sustain a compensable injury and did not have disability. Given that we are reversing and remanding the date of injury issue to the hearing officer, we likewise reverse the hearing officer's determinations that the claimant did not sustain a compensable injury and that the claimant did not have disability and we remand the compensable injury and disability issues to the hearing officer to make determinations consistent with the evidence in this case.

With regard to the timely notice issue, the hearing officer found that the claimant did not timely notify the employer, or an employee holding a supervisory or management position, of the injury and that the claimant did not have good cause for failing to report the injury timely. The hearing officer concluded that the claimant did not timely notify her employer of the claimed injury within 30 days. In this case, it is unclear how the hearing officer determined that the claimant did not timely notify her employer within 30 days, since the date of injury had not been determined. It is necessary to determine the date of injury in order to determine whether the claimant gave timely notice of injury to her employer. It is legal error for the hearing officer to determine the timely notice issue, without determining the date of injury issue. Given that we are reversing and remanding the date of injury issue to the hearing officer, we likewise reverse the hearing officer's determination that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001 and we remand the timely notice issue to the hearing officer to make a determination that is consistent with the evidence in this case.

¹ In *Albertson's, Inc. v. Ellis*, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied), the court characterized the Appeals Panel's affirmance of a hearing officer's determination that the impairment rating could not yet be determined because further development of the evidence was necessary through the appointment of a second designated doctor, as a remand. The court noted that the mere failure of the Appeals Panel to use the word "remand" in its opinion did not make its nonfinal decision final for the purpose of judicial review, and was, in effect, a remand.

SUMMARY

We affirm the hearing officer's determination that the Division did not abuse its discretion in instructing the designated doctor to determine whether an injury resulted from the claimed accident. We reverse the hearing officer's determination that the date of injury could not be determined and we remand the date of injury issue back to the hearing officer to make a determination consistent with the evidence in this case. We reverse the hearing officer's determinations that the claimant did not sustain a compensable injury and did not have disability because those determinations are based on the hearing officer's determination that the date of injury could not be determined and we remand the compensable injury and disability issues to the hearing officer to make determinations on those issues consistent with the evidence in this case. We reverse the hearing officer's determination that the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001 and we remand the timely notice issue to the hearing officer to make a determination that is consistent with the evidence in this case.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge